Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1070

REFRACTARIOS MONTERREY, S.A., *Petitioner,*

v.

FERRO CORPORATION and
U.S. INTERNATIONAL TRADE COMMISSION, *Respondents.*

FERRO CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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QUESTION PRESENTED

The real issue here is restated below for the reason that, as drafted and characterized by Petitioner, it is so broad as to fail to apprise this Court of what the controversy is really all about at this stage.

The essence of the issue is:

> In a situation wherein the ITC terminates an investigation essentially in favor of the respondent

therein, without ever having made a final determination either for, or against, either party, does the United States Court of Customs and Patent Appeals have jurisdiction to entertain an appeal of procedural questions relating to the incomplete, ITC investigation?

In other words, stated as the civil equivalent:

Does a defendant, who has had plaintiff's complaint dismissed by the trial court, have a right to then appeal secondary interlocutory matters, particularly when defendant is left no worse off thereby than he was prior to suit?

ARGUMENT

§ 337(c) of the Tariff Act of 1930 (19 USC 1337) is the principal governing section and is reproduced at this point.

"(c) DETERMINATIONS; REVIEW.—The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person *adversely affected by a final determination of the Commission* under subsection (d) or (e) may appeal *such determination* to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court."

(Emphasis supplied)

The above section, which confers limited jurisdiction on the U.S. Court of Customs and Patent Appeals, unambiguously requires that two conditions be met before the CCPA may assume jurisdiction, and those are:

1. That a person (CCPA appellant) must be *adversely affected,* and
2. That a person must have been adversely affected by a *final determination* of the ITC under subsections (d) or (e) of the Act.

As the CCPA stated in its opinion appealed from (Page 13a, Appendix of the Petition herein):

"We note that the ITC terminated the investigation and dismissed the case against appellant (Petitioner herein)—actions not challenged by appellant."

Therefore, since it is undisputed that the investigation was terminated by the ITC prior to a final determination, in effect dismissing Petitioner herein as a respondent, such dismissal could hardly have "adversely affected" Petitioner. And since it is undisputed that such termination prevented the ITC from ever making a final determination as required by the Act, on the face of it, and really not even subject to challenge by Petitioner, it had no basis for seeking to invoke the jurisdiction of the CCPA.

SUMMARY OF §§ 337(d) and (e)

Simply to complete respondent's argument against the grant of the writ requested, § (d) of the Act, reproduced in the Appendix hereof, provides for exclusion of articles from entry *if* the ITC made an appro-

priate final determination against an ITC respondent; § (e), upon a similar determination, provides for exclusion of articles from entry during an investigation except under bond.

No determination under either (d) or (e) was ever made by the ITC in its investigation, no exclusion order of any kind was ever entered against Petitioner, and, as stated by the CCPA in its decision appealed from (Page 13a, Petitioner's Appendix):

> "It seems apparent that there is no 'final determination' in this case within the meaning of the statute, nor will there ever be. The Commission will not, in this case, now direct that the tile setters be excluded or not excluded from entry into the United States. The Commission dismissed the action."

CONCLUSION

The governing statute is clear, unequivocal and unambiguous. Under its plain terms, and in accordance with its own prior, earlier decision, the CCPA correctly granted Ferro's motion to dismiss Refractarios' appeal, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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19 U.S.C. § 1337

"(d) EXCLUSION OF ARTICLES FROM ENTRY.—If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

"(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND.—If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.